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11 **Attorneys for Defendant**
12 **Donovan Cloud**

13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE EASTERN DISTRICT OF WASHINGTON**
15 **(Honorable Salvador Mendoza, Jr.)**

16 **UNITED STATES OF AMERICA,**
17 **Plaintiff,**

18 **vs.**

19 **DONOVAN CLOUD,**
20 **Defendant.**

21 **NO. 1:19-CR-02032-SMJ-2**

22 **MOTION TO JOIN CO-DEFENDANT**
23 **JAMES CLOUD'S MOTION IN**
24 **LIMINE RE: LINDELL**
25 **LaFOLLETTE'S FALSE MEMORY**
26 **[ECF 185]**

27 **DATE: September 29, 2020**
28 **TIME: 9:00 A.M.**

29 **TO: Clerk of U.S. District Court, Eastern District of Washington**
30 **TO: Thomas J. Hanlon, Assistant United States Attorney**

31 **MOTION TO JOIN CO-DEFENDANT JAMES CLOUD'S**
MOTION IN LIMINE RE: LINDELL LaFOLLETTE'S FALSE
MEMORY [ECF 185] - Page 1

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1 COMES NOW the Defendant, DONOVAN CLOUD, by and through his
2 attorneys of record, RICHARD A. SMITH, of Smith Law Firm and MARK
3 LARRAÑAGA of Walsh and Larrañaga, and moves the Court for an Order allowing
4 the defendant to join in defendant James Cloud's Motion in Limine Re: Lindell
5 LaFollette's False Memory [ECF 185].

6
7 This motion is made based upon co-defendant James Cloud's Motion in
8 Limine [ECF 185] and in reply to the Government's Response [ECF 188] filed
9 September 4, 2020, and the Memorandum of Points and Authorities submitted with
10 this motion.

11 DATED this 10th day of September, 2020.

12 Presented by:

13 /s/ Richard A. Smith

14 RICHARD A. SMITH, WSBA 15127

15 Attorney for Defendant Donovan Cloud

16
17 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
18 **MOTION TO JOIN CO-DEFENDANT JAMES CLOUD'S MOTION IN**
19 **LIMINE RE: LINDELL LaFOLLETTE'S FALSE MEMORY [ECF 185]**

20 Donovan Cloud incorporates herein I (Introduction) and II A-F (Background)
21 of ECF 185, pages 1-21, as factual background in support of this motion.

22 **A. Additional background.**

23 On January 27, 2020 Special Agent Ribail and FBI Special Agent Terami
24 interviewed Lindell LaFollette. During that interview Mr. LaFollette referred to the
25 red shirted male that he saw on June 8, 2020 as James Cloud. It is not clear that
26 either agent showed Mr. LaFollette any photographs or photo montages during this
27 interview or had him refresh his memory with his prior statements.
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30 MOTION TO JOIN CO-DEFENDANT JAMES CLOUD'S
31 MOTION IN LIMINE RE: LINDELL LaFOLLETTE'S FALSE
MEMORY [ECF 185] - Page 2

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1 During the interview agents reported the following:

2 LaFollette referred to the man wearing the red shirt as James Cloud,
3 after seeing Cloud, and hearing the name, on the news.

4 According to this same report he identified a man wearing blue as follows:

5 LaFollette turned to the rear driver's side of the truck, a little in front
6 of the rear tires, and saw the man wearing blue lift up a shotgun and
7 pointed it at LaFollette. LaFollette knew it was a shotgun because the
8 barrel diameter was larger than a rifle. Immediately after, LaFollette
9 was shot in the head. The man wearing blue was also the person that
10 told them that DOBIE was not seeing anyone when they went to
DOBIE's the first time.

11 (BN 10254)

12 Mr. LaFollette never identified the "man wearing blue" by name. He was never asked
13 the name of the "man wearing blue" (likely because the name was known to the
14 agents) and no mention was made of Donovan Cloud, either by name or description.

15 James Cloud filed his Motion in Limine [ECF 185] on August 21, 2020. The
16 motion discloses that the James Cloud defense team interviewed Mr. LaFollette in
17 early August 2020. "During that interview, Mr. LaFollette not only referred to the red
18 shirted male as James Cloud, but now referred to the blue shirted male (the one he
19 previously identified as Morris Jackson) as Donovan Cloud ..." [ECF 185, page 4,
20 lines 14-16].

21 In addition:

22 Mr. LaFollette explained the connection he made between the Clouds
23 and the Medicine Valley murders came from two places:

24 First, the information provided from reporter Phil Ferolito; and
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26
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1 Second, he spoke with “a few different people” (he couldn’t
2 remember who, or whether they were witnesses), all of whom told
3 him the Clouds were responsible for the Medicine Valley murders.

4 Mr. LaFollette stated he had not watched – or read – any news
5 coverage about the Medicine Valley murders except his interview with
6 the Yakima Herald-Republic. So when Mr. LaFollette told the FBI in
7 January 2020 he heard James Cloud’s name in the news, he was
8 referring to what Mr. Ferolito told him before the recorded interview
9 began.

10 Mr. LaFollette also stated he doesn’t think police cautioned him
11 against either speaking with other individuals about the case or having
12 contact with the media.

13 The information Mr. LaFollette received from Mr. Ferolito, as well as
14 “a few other people,” left a lasting impression. It didn’t just cause
15 him to now-ID James Cloud as the red-shirted male; when asked
16 about the blue-shirted male (the one he previously identified during
17 his police-administered line-up as Morris Jackson), Mr. LaFollette
18 now stated that was Donovan Cloud. [ECF 185, page 22, lines 12-19;
19 page 23, lines 1-11]

20 The basis for Mr. LaFollette attaching the specific name of Donovan Cloud to
21 the “man wearing blue” is unclear.

22 According to ECF 185:

23 Mr. LaFollette explained the connection he made between the Clouds
24 and the Medicine Valley murders came from two places:

25 First, the information provided from reporter Phil Ferolito; and

26 Second, “a few different people” (he couldn’t remember who, or
27 whether they were witnesses), all of whom told him the Clouds were
28 responsible for the Medicine Valley murders.

29 [ECF 185, page 22, lines 12-17]

30 MOTION TO JOIN CO-DEFENDANT JAMES CLOUD’S
31 MOTION IN LIMINE RE: LINDELL LaFOLLETTE’S FALSE
MEMORY [ECF 185] - Page 4

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1 However, even after the Yakima Herald interview Mr. LaFollette never
2 identified Donovan Cloud in any capacity at the time of the agents' interview on
3 January 27, 2020. Mr. LaFollette never told the agents that "the man wearing blue"
4 was Donovan Cloud after having seen Donovan Cloud and hearing his name on the
5 news, as he had claimed regarding his identification of James Cloud.

6 On June 9, 2019 Mr. LaFollette identified the "man wearing blue" in a photo
7 montage as Morris Jackson. In a June 20, 2019 recorded interview Mr. Jackson told
8 Agent Ribail:

9 Ribail: Can I ask what happened to your shirt?

10 Jackson: I took it off at the orchard.

11 Ribail: Why?

12 Jackson: Because it was blue ...

13 (June 20, 2019 recorded interview of Morris Jackson)

14 On September 4, 2020 the United States filed its response to the James Cloud
15 Motion in Limine [ECF 188]. In its response, AUSA Richard Burson reveals that
16 during the January 27, 2020 interview by Agent Ribail and Special Agent Terami that
17 Mr. LaFollette stated "that the man in the blue shirt was James Donovan". [ECF 188,
18 page 7, line 17] Agent Ribail's report of January 27, 2020 interview of Lindell
19 LaFollette does not contain any identification of the "man in the blue shirt" as either
20 James Donovan, Donovan, or Donovan Cloud.

21 In conjunction with this Motion to Join, Defense Counsel has requested the
22 Government produce Agent Ribail and Special Agent Terami's rough notes of their
23 interview of Lindell LaFollette on January 27, 2020. The request for rough notes is
24

made pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Defense Counsel is also filing a motion to continue the in-person hearing currently scheduled for September 29 and September 30, 2020 for several reasons to include the opportunity to obtain and review the requested notes and additional time to prepare further briefing if necessary and to prepare for hearing on the noted motions.

B. The August identification of Donovan Cloud by name as the man in blue has no probative value.

Donovan Cloud adopts the “discussion” III of ECF 185 as applicable to Donovan Cloud contained in B (probative value of Mr. LaFollette’s identification of Donovan Cloud by name) and C (prejudicial effect of Mr. LaFollette’s identification of Donovan Cloud by name is substantial).

C. The prejudicial effect of allowing Mr. LaFollette to refer to the “man wearing blue” as Donovan Cloud is substantial.

According to Dr. Laney (James Cloud defense team eyewitness identification expert), in most cases people cannot tell the difference between false memories and true ones. Consequently, “little can be done to correct memory once it has been corrupted.” (ECF 185, page 31, lines 11-14.) Dr. Laney will also testify that “[r]esearch in jury decision-making shows that eyewitness testimony in general is more influential than its value justifies.” This undue influence happens because jurors “overvalue witness confidence” and “undervalue key factors, including identification procedure errors,” which are known to substantially impact ID accuracy. This concept explains why procedural fixes for tainted testimony, such as curative jury instructions, are “largely inadequate”. (ECF 185, page 32, lines 4-9.)

1 In this case it is unclear how Mr. LaFollette came to the name of Donovan
2 Cloud as the “man wearing blue”. Whether by outside influence, media, drug use,
3 short term memory loss or just fabricated out of thin air. What is clear is that allowing
4 Mr. LaFollette to identify the “man wearing blue” by the name of Donovan Cloud or
5 any name including Donovan is extremely prejudicial, without any basis in fact, and is
6 false. Consequently, Donovan Cloud asks this Court to prohibit Mr. LaFollette from
7 identifying the “man wearing blue” by the name of Donovan Cloud, James Donovan
8 or Donovan.
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10 DATED this 10th day of September 2020.

11 Presented by:

12 /s/ Richard A. Smith

13 RICHARD A. SMITH, WSBA 15127

14 Attorney for Defendant Donovan Cloud
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on September 10, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties.

/s/ Lugene M. Borba

LUGENE M. BORBA

Legal Assistant, Smith Law Firm